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DISSENTING VIEWS

We oppose H.R. 1913 as an unconstitutional threat to religious freedom, freedom of speech, equal justice under the law and basic federalism principles.

Justice should be blind to the personal traits of victims. Under the Majority's hate crime bill, H.R. 1913, criminals who kill a homosexual, transvestite or transsexual will be punished more harshly than criminals who kill a police officer, a member of the military, a child, a senior citizen, or any other person. Hate crimes legislation hands out punishment according to the victim's race, gender, sexual orientation, disability or other protected status.

We all deplore bias-related violent crimes. Every violent crime is a tragedy and we must do everything we can to ensure public safety in our communities. Violent crimes committed in the name of hatred of a group can be devastating to a victim and a community. These crimes must be vigorously prosecuted at the state and local level.

Our criminal justice system has been built on the ideal of "equal justice for all." If enacted this bill will turn that fundamental principle on its head—justice will depend on whether or not the victim is a member of a protected category: a vicious assault of a homosexual victim will be punished more than the vicious assault of a heterosexual victim. A senseless act of violence, committed with brutal hatred and viciousness, will be treated as less important than one where a criminal is motivated by hatred of specific categories of people. Justice will no longer be equal but now will turn on the race, gender, sexual orientation, disability or other protected status of the victim. All victims should have equal worth in the eyes of the law, regardless of race or status.

By opening the door to criminal investigations of an offender's thoughts and beliefs about his or her victims, this bill will raise more controversy surrounding a crime. Groups now will seek heightened protections for members of their respective groups, and require even more law enforcement resources to investigate a suspect's mindset.

Even more dangerous, although perhaps unintended, the bill raises the possibility that religious leaders or members of religious groups could be prosecuted criminally based on their speech or protected activities. A chilling effect on religious leaders and others who express their beliefs will unfortunately result.

The bill itself is unconstitutional and will be struck down by the courts. No matter how vehemently proponents of the bill try to defend a Federal nexus—there is simply no impact of such crimes on interstate or foreign commerce. The record evidence in support of such a claim is transparent and will be quickly brushed aside by any reviewing court.

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The Supreme Court, in *United States v. Morrison,* 529 U.S. 598 (2000), struck down a prohibition on gender-motivated violence, and specifically warned Congress that the commerce clause does not extend to "non-economic, violent criminal conduct" that does not cross state lines. Nor is the proposed legislation authorized under the 13th, 14th, or 15th amendments.

Aside from the constitutional infirmities that riddle this bill, the sponsors are seeking to address a problem that is not overwhelming our state or local governments. FBI statistics show that the incidence of hate crimes has actually declined over the last ten years. Of the reported hate crimes in 2007, 9 were murders and 2 were rapes. Only 9 of approximately 17,000 homicides in the Nation involved so called hate crimes. A majority of the crimes reported by the FBI involved "intimidation" with no bodily injury—words or verbal threats against a person. There is zero evidence that states are not fully prosecuting violent crimes involving hate. Violent crimes are vigorously prosecuted by the states. In fact, 45 states and the District of Columbia already have specific laws punishing hate crimes, and Federal law already punishes violence motivated by race or religion in many contexts.

At the markup, we sought to address these infirmities with the bill—to restore equal justice under law, to protect the freedom of expression and religious freedom that is so important to our Nation, and to ensure that the enumerated powers of the Federal Government are not inappropriately expanded. We offered 18 amendments to this legislation but the Majority defeated each and every one of our attempts to address these problems.

H.R. 1913 RAISES FIRST AMENDMENT CONCERNS AND OPENS THE DOOR TO THE PROSECUTION AND INVESTIGATION OF SPEECH AND RELIGIOUS ACTIVITIES AND GROUPS

The first amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." America was founded upon the notion that the government should not interfere with the religious practices of its citizens. Constitutional protection for the free exercise of religion is at the core of the American experiment in democracy.

Hate crimes legislation that selectively criminalizes bias-motivated speech or symbolic speech is not likely to survive constitutional review; however, hate crimes statutes that criminalize bias motivated violence may survive a first amendment challenge. *Cf. R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992) (striking down ordinance that selectively prohibited types of hateful speech); and *Wisconsin v. Mitchell,* 508 U.S. 476 (1993) (upholding a state hate crime penalty enhancement for a violent crime and finding that restriction on speech was justified when linked to violent act).

However, hate crimes legislation can have a chilling effect on speech and first amendments rights by injecting criminal investigations and prosecutions into areas traditionally reserved for protected activity. The line between bias-motivated speech and bias-motivated violence is not so easy to draw.

For example, in prosecuting an individual for a hate crime, it may be necessary to seek testimony relating to the offender's

thought process to establish his motivation to attack a person out of hatred of a particular group. Members of an organization or a religious group may be called as witnesses to provide testimony as to ideas that may have influenced the defendant's thoughts or motivation for his crimes, thereby expanding the focus of an investigation to include ideas that may have influenced a person to commit an act of violence. Such groups or religious organizations may be chilled from expressing their ideas out of fear from involvement in the criminal process.

Moreover, under existing criminal law principles, the bill raises the possibility that religious leaders or members of religious groups could be prosecuted criminally based on their speech or protected activities. Using conspiracy law or section 2 of title 18 which allows for the prosecution of anyone who aids, abets, counsels, commands, induces or procures the commission of a crime, or anyone who "willfully causes an act to be done" by another, it is easy to imagine a situation in which a prosecutor may seek to link hateful speech by one person to causing hateful violent acts by another.

Ultimately, a pastor's sermon concerning religious beliefs and teachings could be considered to cause violence and will be punished or at least investigated. Once the legal framework is in place, political pressure will be placed on prosecutors to investigate pastors or other religious leaders who quote the Bible or express their long-held beliefs on the morality and appropriateness of certain behaviors. Religious teachings and common beliefs will fall under government scrutiny, chilling every American's right to worship in the manner they choose and to express their religious beliefs.

Hate crimes laws could be used to target social conservatives and traditional morality. Hate crimes laws have already been used to suppress speech disfavored by cultural elites—indeed this may be their principal effect. Of the 4300 hate crimes against persons reported by the FBI in 2007, over 2,000 incidents involved "intimidation," usually defined as threatening words. The "intimidation" category does not even exist for ordinary crimes. This vague concept is already being abused by some local governments, which target speech in favor of traditional morality as hate speech. In New York, a pastor who had rented billboards and posted biblical quotations on sexual morality had them taken down by city officials, who cited hate-crimes principles as justification. In San Francisco, the city council enacted a resolution urging local broadcast media not to run advertisements by a pro-family group, and recently passed a resolution condemning the Catholic Church because of its "hateful" views. No viewpoint should be suppressed simply because someone disagrees with it.

H.R. 1913 IS INCONSISTENT WITH FEDERALISM PRINCIPLES

The bill raises significant federalism concerns, and provides protected status to victims based on religion, national origin, gender, sexual orientation, gender identity or disability.

All violent crimes can be "hate" crimes, and there is little justification for singling out specific groups of victims for Federal protection. A Federal law criminalizing violent actions based upon a victim's real or perceived characteristics would be such an act.

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Such a law criminalizes acts that have long been regulated primarily by the states. Under the Federal system, the Supreme Court has observed, "States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson,* 507 U.S. 619, 135 (1993) (*quoting Engle v. Isaac,* 456 U.S. 107, 128 (1982)). "Our national government is one of delegated powers alone. Under our Federal system the administration of criminal justice rests with the states except as Congress, acting within the scope of those delegated powers, has created offenses against the United States." *Screws v. United States,* 325 U.S. 91, 109 (1945) (plurality opinion).

The Court has viewed the expansion of Federal criminal laws with great concern due to their alteration of the balance of Federal-State powers. "When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Lopez,* 514 U.S. 549, 561 n. 3 (1995) (*quoting United States v. Emmons,* 410 U.S. 396, 411–12 (1973)).

Congress should not act quickly or without due deliberation before it chooses to further federalize yet another area that generally lies within the competence of the states. Given the principles of federalism that govern the Constitution, Congress should not use its powers until it is confident that hate crimes are a problem that is truly national in scope.

H.R. 1913 VIOLATES THE INTERSTATE COMMERCE CLAUSE AND HAS NO SUPPORT UNDER THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS

In addition to federalism concerns, the legislation creates Federal jurisdiction on tenuous constitutional grounds, relying on the Commerce Clause, and the 13th, 14th, and 15th amendments.

Interstate Commerce Clause

The Supreme Court, in *United States v. Morrison,* 529 U.S. 598 (2000), struck down a prohibition on gender-motivated violence, and specifically ruled that Congress has no power under the Commerce Clause or the 14th amendment over "non-economic, violent criminal conduct" that does not cross state lines. The Court concluded that upholding the criminal provision of the Violence Against Women Act would open the door to a federalization of virtually all serious crimes as well as family law and other areas of traditional state regulation. *Id.* at 615–16.

The Supreme Court's *Morrison* decision followed several other decisions in which the Court clarified the Constitution's restrictions on Congress's exercise of its powers under both the Interstate Commerce Clause and section five of the 14th amendment. *See United States v. Lopez,* 514 U.S. 549 (1995); *see also Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank,* 527 U.S. 627 (1999); *City of Boerne v. Flores,* 521 U.S. 507 (1997).

Federal efforts to criminalize hate crimes cannot survive the federalism standards articulated by the Supreme Court. Not only does much of the hate crime problem go beyond what Congress may regulate under the Interstate Commerce Clause, but Congress has yet to perform the extensive fact-finding required to demonstrate that

hate crimes are a national problem that requires a Federal solution.

In cases in which Congress uses its enforcement powers under section five of the 14th amendment, the Court has said, it must identify conduct that violates 14th amendment rights, and its must tailor the legislative scheme to remedying or preventing such conduct. To meet these requirements, Congress must conduct fact-finding to demonstrate the concerns that led to the law.

In *City of Boerne v. Flores,* the Court found that Congress had "little evidence of infringing conduct on the part of the States" in the use of facially-neutral laws to infringe religious liberties. *City of Boerne,* 521 U.S. at 530–32. In *Florida Prepaid,* the Court noted that "[i]n enacting the Patent Remedy Act. . . . Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." The Court held that Congress had found few instances in which states had violated Federal patent laws, and so invalidated the Patent Remedy Act's abrogation of state sovereign immunity. *Florida Prepaid,* 527 U.S. at 645–46.

In order to create a case for the constitutionality of a law criminalizing hate crimes, Congress must engage in fact-finding. Unfortunately, in their haste to rush this bill through the Committee, the majority has not done any fact finding whatsoever. To meet this standard, the Majority failed to hold adequate hearings concerning the scope of hate crimes in this country, their numbers, and their impact on the economy.

The only iota of fact-finding to be found in relation to H.R. 1913 is section two of the bill, which lays out various "findings" regarding so-called hate crimes. Ironically, and inexplicably, the Majority chose to remove this section from the bill through adoption of a manager's amendment offered by Mr. Scott.

Until Congress engages in this sort of legislative spadework, it will not be able to justify any factual basis for its action.

Fourteenth and Fifteenth Amendments

The 14th and 15th amendments do not provide Congress with the claimed authority. The 15th amendment forbids the Federal Government or a state from denying or abridging the right to vote on the basis of an individual's race, color or previous condition of servitude. The 14th amendment prohibits the states from denying equal protection of the law, due process or the privileges and immunities of U.S. citizenship. Both of these amendments extend only to state action and do not encompass the actions of private persons. Hate crimes by private persons are outside the scope of these amendments.

Thirteenth Amendment

Section two of the 13th amendment stands on different footing. The Amendment proscribes slavery and involuntary servitude without reference to Federal, state or private action. In order to reach private conduct, i.e. individual criminal conduct, Congress would have to find that hate crimes against certain groups constitute a "badge and incident" of slavery. See *Griffin v. Breckenridge,* 403 U.S. 88, 105 (1971).

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The Court has addressed Congress's power under section two in only a few cases, the chief of which is *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968). In that case, the Court upheld 42 U.S.C. § 1982—passed originally as part of the Civil Rights Act of 1866—which was read to bar discrimination against African-Americans in the sale or rental of property.

Unlike the 14th amendment, the Court emphasized, the 13th amendment allows Congress to enact laws that operate upon the acts of individuals, regardless of whether they are sanctioned by state law. Section two of the amendment "clothed Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Jones,* 392 U.S. at 439. Therefore, the Court observed, "[s]urely Congress has the power under the 13th amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440. The Court, however, has not provided much guidance beyond Jones on what constitutes "the badges and the incidents of slavery." *See, e.g., Carpenters, Local 610 v. Scott,* 463 U.S. 825 (1983); *Griffin v. Breckenridge,* 403 U.S. 88 (1971).

Congress should tread carefully before it chooses to pass a hate crimes statute on the basis of section two of the 13th amendment. Such a law would have to be utterly clear that it is based on the grant of authority to combat slavery. Only vaguely asserting that some hate crimes might be linked to vestiges, badges, or incidents of slavery or segregation would not be enough.

Although there have been few judicial pronouncements on the scope of the 13th amendment, the *Jones* case was limited to discrimination on the basis of race, specifically discrimination against African-Americans. Efforts to include within a hate crimes prohibition those crimes motivated by national origin, religion, gender, sexual orientation, disability and any other factor other than race would amount to a congressional effort to interpret the 13th amendment beyond that so far permitted by the Supreme Court. The Court will want to ensure that, in defining badges and incidents of slavery to include hate crimes, Congress has enacted remedial and preventative legislation that seeks to end the true effects of slavery, rather than attempting to re-define the term "slavery" or "involuntary servitude" as it has been interpreted by the Supreme Court.

STATISTICS SHOW THAT HATE CRIMES HAVE DECLINED OVER THE LAST TEN YEARS

FBI statistics show that the incidence of hate crimes has declined over the last ten years. In 1997, a total of 8,049 bias-motivated criminal incidents were reported by the FBI. Statistics for four of those years, 2002 through 2005, demonstrated a steep decline in the number of hate crimes reported. In 2005, for example, 7,163 hate crimes were reported. In the last two years for which data is available, there has been a slight uptick in the number of hate crimes—7,722 incidents in 2006 and 7,624 in 2007—but fewer hate crimes are committed today than ten years ago.

In 2007, 51 percent of the crimes involved racial bias; 18 percent involved anti-religion bias; 17 percent involved sexual orientation

bias; and 13 percent involved national origin bias. Anti-disability bias was about 1 percent. Further, in 2007, there were 1,083 violent crimes against persons—rape, murder, assault, intimidation, and robbery—that were based on bias against sexual orientation, or approximately 3.6 incidents per 100,000 inhabitants. In contrast, there were a total of 1,408,337 violent crimes committed in 2007, or about 466.9 violent crimes incidents per 100,000 inhabitants.[1]

According to FBI data, there were 16,929 murders in the U.S. in 2007. Of that number, nine murders were classified as "hate crimes". By doing the math, we learn that "hate-crimes" murders make up less than one-tenth of 1% of the murders committed in the U.S. in 2007. This begs the question of why the House would pass legislation that ignores 99.9% of the murders in this country.

STATE PROSECUTIONS ALREADY ADDRESS VIOLENT CRIMES AND HATE CRIMES

Hate-crimes laws are unnecessary: the underlying offense is already fully and aggressively prosecuted in almost all states. There is zero evidence that states are not fully prosecuting violent crimes involving "hate."

Moreover, 45 states and the District of Columbia already have laws punishing hate crimes, and Federal law already punishes violence motivated by race or religion in many contexts. In the absence of data that states are unable to prosecute or decline to prosecute hate crimes, there is no reason for the Federal assertion of jurisdiction or the diversion of Federal resources to such investigations and prosecutions.

Some of the most notorious hate crimes were prosecuted under state laws, and there is no evidence that states are unable or unwilling to prosecute such crimes. Of the 5 states with no current hate crime legislation (Georgia, Indiana, Arkansas, South Carolina, and Wyoming), Georgia and Indiana have passed legislation pertaining to hate crimes in recent years, and in both states the legislation has been struck down by the courts.

NEED TO PROTECT MILITARY, UNBORN CHILDREN, THE ELDERLY, AND MOTHERS

In protecting limited categories of groups, such as race, religion, sexual orientation, gender or gender identity, the Majority rejected our attempts to add other equally meritorious groups such as current and former members of the Armed Forces, senior citizens, and pregnant women. We can see no reason to distinguish among these groups—all of them deserve heightened protection against hate-motivated crimes. Despite the evidence of crimes targeting these members of these groups, the Majority has made its priorities clear, and

[1] The 1990 Hate Crime Statistics Act charged the U.S. Attorney General to "acquire data . . . about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including, where appropriate, the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property." The Hate Crimes Statistics Act does not require collection of hate crimes statistics for violent crimes alleged to be motivated by "gender identity." A 1994 amendment added the disabled to the list of groups to be tracked. The Attorney General delegated data collection of hate crimes principally to the FBI. The FBI appended information on bias motivation to the Uniform Crime Report (UCR).

has done a disservice to our Armed Forces, senior citizens, and pregnant women.

Members of the Armed Forces

We honor our men and women of the military because of their patriotism, their commitment to protecting our freedom and to serving our country. In times of controversy surrounding the use of our military, we have seen unfortunate acts by those who use their hostility towards the military to further their political agenda.

For example, recently we were faced with the practice of groups protesting at military funerals of soldiers killed in Iraq. This sick and despicable behavior intruded on the family of the lost soldier and the need for privacy and respect. Congress acted in 2006 in passing legislation to restrict the right of protesters to interfere with military funerals.

With the rising debate over the Iraq War, we are seeing increased threats to Iraq War veterans. In 2004, Private First Class Foster Barton, of Grove City, Ohio, was brutally beaten in the parking lot of a music venue in Columbus as he was leaving a concert. According to the Columbus police, six witnesses who didn't know Barton said the person who beat him up was screaming profanities and making crude remarks about U.S. soldiers. Barton had been on a 2-week leave from service in Iraq when the incident happened. A year later, during a peace rally, a war veteran was spit on by a protester at the rally. Such incidents were all too common place during the upheaval surrounding the Vietnam War, when hundreds of threats and spitting incidents occurred against Vietnam War veterans.

We need to make it clear to everyone that we honor members of our Armed Forces. Any act of violence against a member of the Armed Forces must be met with swift and sure punishment. Crimes against our Armed Forces must be punished at a heightened level just like the other groups that are given protection under this Act.

During consideration of H.R. 1913, Mr. Rooney offered an amendment to add current and former members of the Armed Services to the list of classes protected under this legislation. The Majority rejected this amendment and defeated it in a party-line vote.

Unborn Children

Partial birth abortion is a barbaric procedure that cannot be tolerated in a civilized society. During this procedure, a partially-born, living infant is literally ripped from his mother's womb and stabbed in the back of the head. As Senator Moynihan stated so poignantly, "this is just too close to infanticide. A child has been born and it has exited the uterus and, what on Earth is this procedure?"

On April 18, 2007, the Supreme Court, in *Gonzales v. Carhart,* 127 S.Ct. 1610 (2007), ruled constitutional the Federal law banning partial birth abortions, finding that the ban on partial birth abortions does not place an undue burden on a woman's right to an abortion because there are alternative conventional abortion procedures that can be used if necessary. *Id.* at 1632.

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During consideration of H.R. 1913, Mr. Jordan of Ohio offered an amendment to include unborn children killed by a partial birth abortion as a class of protected persons under the hate crimes statute. Unfortunately, the chair ruled the amendment non-germane based on the erroneous rationalization that unborn children are not "persons" for the purposes of the hate crimes law.

Pregnant Women

All acts of violence against women are abhorrent, but they are especially disturbing when committed against pregnant women. When a violent crime causes injury to a pregnant woman that results in a miscarriage or other damage to the fetus, we all share the desire to ensure that our criminal justice system responds decisively and firmly to exact appropriate punishment.[2]

On December 16, 2004, Bobbi Jo Stinnett, in Skidmore, Missouri, was 23 years old when she was strangled to death and her unborn child was killed. The killer, Lisa Montgomery, who was 36 years old, had met Stinnett in an online chat room and met with her at her home under the pretext of buying a dog. Montgomery specifically targeted Stinnett because she was pregnant. Montgomery had lost a child she was carrying prior to murdering Stinnett.

A 2002 GAO report cited estimates from 15 states that between 2.2 percent to 6.4 percent of pregnant women had been violently attacked. This is intolerable and we should do more to protect pregnant women from attack.

During consideration of H.R. 1913, Mr. Goodlatte offered an amendment to add pregnant women to the list of classes protected by this legislation. The Majority rejected this amendment and defeated it in a party-line vote.

Senior Citizens

Our senior citizens are vulnerable, like our children, to violent abuse. Recent events have underscored the harm to our senior citizens from violent crime, and the need to make sure that hate crimes against our senior citizens do not occur.

On March 4, 2007, a New York City man was videotaped by a surveillance camera mugging a 101-year-old woman in the lobby of her apartment building. The heartlessness and hatred of this attack is clearly conveyed on the videotape when Rose Morat was trying to leave her building to go to church. The robber acted like he was going to help her through the vestibule and then turned and delivered three hard punches to her face and grabbed her purse. He pushed her and her walker to the ground. Rose Morat suffered a broken cheekbone and was hospitalized. Police believe the same suspect robbed an 85-year-old woman shortly after fleeing from Rose Morat's apartment house.

During consideration of H.R. 1913, Mr. Goodlatte offered an amendment to add senior citizens to the list of classes protected by this legislation. The Majority rejected this amendment and defeated it in a party-line vote.

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[2] In 2004, Congress passed the Unborn Victims of Violence Act, 18 U.S.C.A. §1841, and created a separate criminal offense for the killing of an unborn child during the commission of a violent crime against a pregnant woman.

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CONCLUSION

As outlined above, H.R. 1913 suffers from numerous problems. The Majority's rush to judgment ensures that, even if enacted, the hate crimes statute will most likely be overturned by the courts, and therefore, will be counter-productive to its stated goal of assisting state and local law enforcement to reduce bias-motivated violence.

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